Paragon Systems, Inc. *and* Arthur J. Blake. Case 10–CA–095371

August 26, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On February 7, 2014, Administrative Law Judge Heather Joys issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The principal issue in this case is whether the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Protective Security Officers (PSOs) Arthur Blake, Joel Baker, and John Holland because of their union activities. Before deciding that issue, however, we must first address the Respondent's contention that the alleged unfair labor practices are nonjusticiable because the suspensions and discharges were purportedly grounded in national security concerns. For the reasons discussed below, we agree with the judge that the Respondent failed to establish that this case is nonjusticiable. We also agree that the Respondent unlawfully suspended and discharged the PSOs for their union activities.

I. FACTS

We begin by briefly reviewing the relevant facts. The Federal Protective Service (FPS), a division of the United States Department of Homeland Security, provides security services at Federal facilities across the country. At the Federal facility in Savannah, Georgia, that houses offices of the Army Corps of Engineers, FPS subcontracts that work to the Respondent, a private-sector employer. PSOs Blake, Baker, and Holland worked for the Respondent at the facility as security guards. Each was also an officer of the United Security Police Officers of America (the Union). During the course of contract negotiations in January 2012, in which both Blake and Holland participated, the Union issued a strike notice.[3] On January 31, while off duty, Blake parked his car in the Savannah facility's loading dock and entered the building to deliver a packet of materials, including a copy of the strike notice, to Colonel Jeffery Hall, the Corps of Engineers' highest ranking officer in Savannah. Baker was the PSO on duty at the loading dock when Blake arrived. Baker checked Blake's Federal credential but, consistent with the common practice at the facility, did not subject fellow PSO Blake to the entire screening process for visitors, which required visitors to not only present identification but also go through a magnetometer and put any packages through an X-ray scanner. Baker recorded Blake's name in the Officer's Operations Log, handed Blake several documents expressing the PSOs' workplace concerns to take to Colonel Hall, and allowed Blake to enter the building. Blake then proceeded to Colonel Hall's office, gave Colonel Hall the documents, and discussed them, including the strike notice, with him. Approximately 30 minutes after his arrival, when his meeting with Colonel Hall ended, Blake exited the building through the loading dock, where Holland had just arrived to relieve Baker. The three men had a conversation lasting approximately 12 minutes.

More than 2 weeks later, on February 17, the Respondent's contract manager, Vernon Fields, telephoned Jennie Dingman, the FPS contracting officer's technical representative (COTR) for the Savannah contract, to inform her that a PSO had notified Colonel Hall about the strike vote. The strike vote was not news to Fields, who had learned of it several weeks earlier. Nor was it news to Dingman, who, as the judge found, had already requested and received a strike contingency plan from the Respondent prior to February 17. Rather, Fields contact-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and to require the Respondent to inform Federal Protective Service of this Decision and Order. See *Security, Police & Fire Professionals Local 444*, 360 NLRB No. 57 (2014). We agree with the judge that it is appropriate to require the Respondent to reimburse the discriminatees for any additional Federal and State income taxes they may owe as a consequence of receiving a lump-sum backpay award in a calendar year other than the year in which the income would have been earned in the absence of discrimination, and to file a report with the Social Security Administration allocating backpay for each discriminatee to the appropriate calendar quarters. *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014). We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[3] No strike actually took place.

ed Dingman not to inform her of the strike notice or any security concerns, but, in his words, "[b]ecause now we had the client involved," a reference to Blake's conversation with the colonel.[4]

In response to Fields' call, Dingman telephoned a security desk at the facility on February 17 and spoke with two PSOs, one of whom was Holland. Dingman first asked Holland whether anyone had visited the colonel within the last few days, to which Holland responded "no." Dingman then asked Holland whether a PSO had visited the colonel at any time, and Holland told her that he was aware that someone had delivered some paperwork to the colonel, but he did not know who or when.[5]

On February 22, 2012, Dingman traveled to Savannah to investigate whether a PSO had contacted the tenant agency about the strike notice. She asked her supervisor, John Hathaway, and the Respondent's assistant contract manager, Victoria Edmiston, to attend the interviews she conducted with the PSOs. Dingman first interviewed Baker. Based on the information she obtained during that interview, she interviewed Blake and again interviewed Holland. During those interviews, Dingman told the three PSOs that they could not access the facility when off duty by showing their credentials, that their credentials were to be used for work purposes only, and that they were to be treated as visitors when accessing the building off duty. Each of the PSOs stated that he was unaware of those requirements. During her second interview with Holland, Dingman confronted him about denying that he knew of Blake's activity during their earlier conversation, and Holland admitted that he had not told her the truth before.

During her interview with Baker, Dingman asked him if he had any knowledge of an incident involving a PSO talking to the colonel about a possible strike. When Baker gave evasive responses to her questions, Dingman told him that his responses could be construed as "obstruction of and [sic] Investigation." Dingman also questioned Blake about his delivery of the strike notice to the colonel. During her interrogations of Blake and Baker, Dingman told them that they were not permitted to speak directly to tenants. When Baker and Blake each responded that the PSOs had a ruling from the National Labor Relations Board that prohibited the Respondent from restricting them from talking to clients, Dingman made disparaging statements about the settlement agreement the Respondent had reached with the Board.[6] Dingman also warned Baker and Blake that if the Union struck, the PSOs would be removed from the contract and would never work on another Federal contract. Edmiston, who was present during the interviews, remained silent.

Approximately 3 months later, Dingman produced a report in which she recommended that all three PSOs be removed from the contract because they had committed numerous infractions, including unauthorized parking, unauthorized access, and dishonesty. Dingman concluded her report by stating that the actions of Baker, Blake, and Holland did not meet "Government standards of this contract," and that:

> They have their own agenda and have proven with their actions listed above the security of the Federal Facility for which they are assigned come [sic] second to handling their own personal grievances. It is my professional opinion as the COTR of this contract that all three PSO's [sic] be removed. They have less than stellar candor and have shown without a shadow of a doubt their disregard for the safety of the government's facility, information or employees.

On May 31, Dingman forwarded the report to FPS Contract Specialist Lawanna Nunnally, who in turn forwarded it to the Respondent on July 6. On July 10, Baker, Blake, and Holland were issued suspension notices, signed by Edmiston, stating that they were being suspended pending further investigation. Blake's suspension letter stated that he "allegedly entered a restricted area without an escort; displayed unethical or improper use of official authority, credentials or equipment; dishonesty and immoral conduct that violates rules, regulations or established policy of the government." Baker's suspension letter asserted: "You allegedly neglected to perform your duties (including Building Rules and Regulations, Unauthorized Access and Traffic Control, Dishonesty and Negligence)." Holland's suspension letter stated: "You allegedly disregarded orders, including your post orders, special orders or instructions and were dishonest or lying to a government official or your supervisor."

[4] Tenant agencies, such as the Army Corps of Engineers, are referred to as "clients."

[5] In fact, Holland knew that Blake had visited the colonel. According to Dingman's report, Holland did not tell her about Blake's visit initially because he said he "didn't want to get in trouble."

[6] In March 2011, the Respondent entered into a settlement agreement with the Board to resolve allegations in a charge filed by Blake. In this agreement, the Respondent agreed to revise its "Chain of Command" rule, which prohibited employees from directly contacting the Respondent's clients or clients' customers for any reason. The new rule contained no such prohibition. Nonetheless, during the February 22 interview, Dingman told Baker he could not directly contact a tenant. When Baker referenced the settlement agreement, Dingman asked whether Baker took orders from "the NLRB" or the Respondent.

Although the July 10 notices stated that the three PSOs were suspended pending further investigation, the Respondent discharged Baker, Blake, and Holland on July 12 without any further investigation. FPS did not follow the established procedure of convening a Review Board when the Federal Government seeks the removal of a PSO; nor did the Respondent consider the PSOs' alleged misconduct under the collective-bargaining agreement's progressive disciplinary policy. Instead, as found by the judge, the "Respondent was aware [that] Dingman's animus toward the protected activity formed the basis for her recommendation yet deliberately conducted an inadequate investigation into the allegations against Blake, Baker, and Holland in order to justify its decision to discharge them."[7]

II. JURISDICTION

There is no statutory or case-created "national security" exception to the Board's jurisdiction.[8] The Respondent argues, however, that the PSOs' terminations are nonjusticiable under *Department of the Navy v. Egan*, 484 U.S. 518 (1988). In that case, the Supreme Court held that the Merit Systems Protection Board lacked the authority to review the Navy's denial of a security clearance to a Federal civilian employee of the Navy at a nuclear submarine facility, which resulted in the employee's loss of his job. The Court reasoned that such decisions entail "predictive judgment[s]" that must be made by individuals with the "necessary expertise in protecting classified information," and that it would not be "reasonably possible for an outside nonexpert body to review the substance of such a judgment." Id. at 529.

In the present case, the judge rejected the Respondent's argument, noting that the PSOs at the Savannah facility were not required to, and did not, have security clearances; rather, FPS issued them "suitability determinations," *which were never revoked*. Thus, the judge found, even if *Egan* applied to the revocation of suitability determinations, it would not support the Respondent's argument.

In its exceptions, the Respondent correctly points out that courts have held that the Supreme Court's reasoning in *Egan* may also apply to denials or revocations of suitability determinations, at least those based on national security concerns. See, e.g., *Foote v. Moniz*, 751 F.3d 656 (D.C. Cir. 2014) (finding unreviewable under *Egan* an agency determination not to certify an applicant for Federal employment as suitable for its Human Reliability Program, which requires the applicant to already possess or obtain the highest level of security clearance), cert. denied 135 S.Ct. 711 (2014); *Bennett v. Chertoff*, 425 F.3d 999, 1002 (D.C. Cir. 2005) (finding unreviewable under *Egan* a Department of Defense determination that an employee was unable to retain a security clearance on the basis of a negative suitability determination); *Cruz-Packer v. Chertoff*, 612 F. Supp. 2d 67, 71 (D.D.C. 2009) (same, employer was Transportation Safety Administration). Moreover, it is now well established under *Egan* that an adverse employment action is unreviewable if it is based on the employee's inability to obtain or maintain a security clearance or to receive or retain a favorable suitability determination because of national security considerations. See, e.g., *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) ("[U]nder *Egan* an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII."); *Ciralsky v. CIA*, 689 F. Supp. 2d 141, 149 (D.D.C. 2010) (same).

As the judge found, FPS did not revoke the PSOs' suitability determinations, and we therefore agree with the judge that *Egan* does not apply. Our conclusion would be the same even assuming, for the sake of argument, that an authoritative "recommendation" from an Executive Branch official that private sector employees be barred from working on Federal contracts for national security reasons is unreviewable for reasons similar to those expressed in the foregoing precedents. Here, we find no evidence that national security concerns animated Dingman's recommendation to remove the PSOs. Where adverse employment decisions were not based on national security considerations, courts have found no bar to review.[9] The Respondent notes that nonjusticiability has

[7] As further found by the judge, an investigation would have disclosed, among other things, that the rules on which Dingman relied for improper access did not address off-duty PSOs, and Baker's method of access on January 31 was a widespread practice. Further, had the conduct of the three PSOs been so serious as to justify their discharge, the judge found it inconceivable that Edmiston would have taken no action against the PSOs, permitting them to continue to work for several months after the February 22 interviews she attended.

[8] See *Firstline Transportation Security*, 347 NLRB 447, 456 (2006).

[9] Thus, in *Jones v. Ashcroft*, 321 F. Supp. 2d 1, 8–9 (D.D.C. 2004), a Title VII case, the court rejected the Government's contention that the FBI's denial of employment to a job applicant because of "perceived lack of forthrightness" was unreviewable under *Egan* and *Ryan v. Reno*, supra. The court found "nothing in the record . . . to indicate that the FBI's suitability determination was made with any 'predictive judgment' about whether hiring plaintiff would implicate national security concerns," or indeed that the Government had ever "considered national security as a basis for its decision not to hire the plaintiff." Id. at 8. The court concluded that *Egan*'s rationale is limited to suitability determinations "made *in the interest of national security*, and that does not appear to be the case here." Id. (italics in original). Similarly, in *Corbett v. Napolitano*, 897 F. Supp. 2d 96, 117–119 (E.D. N.Y. 2012), another Title VII case, the court found subject matter jurisdiction where the plaintiff was found unsuitable for employment by the U.S. Customs and Border Patrol (CBP) for reasons unrelated to national security,

been held to extend even to the decisions of private contractors when they are authorized by the Executive Branch to make national security-related decisions. *Beattie v. The Boeing Company*, 43 F.3d 559, 566 (10th Cir. 1994). But even if the Respondent made the decision to discharge the PSOs independently of Dingman's recommendation, there is no showing that its decision was based on national security considerations.

For all the foregoing reasons, we find that the Respondent has failed to establish that this case is nonjusticiable.[10]

III. UNFAIR LABOR PRACTICE ALLEGATIONS

We turn now to the merits of the complaint allegation, that the Respondent suspended and discharged Blake, Baker, and Holland because of their union activities. The judge found that the suspensions and discharges were unlawful. We adopt those findings for the reasons set forth in the judge's decision and for the additional reasons explained below.

The judge correctly found that the appropriate analytical framework for addressing this issue is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel has the initial burden to show that the employees' union activities were a motivating factor in the employer's actions against them. 251 NLRB at 1089. The elements commonly required to support a finding of discriminatory motivation are union activity by the employee, employer knowledge of the activity, and union animus on the part of the employer. See, e.g., *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 (2011). The burden then shifts to the employer to demonstrate that it would have taken the same actions even absent the employee's union activity. *Wright Line*, supra, 251 NLRB at 1089.

As the judge found, there is no dispute that Blake, Baker, and Holland engaged in union activity and the Respondent was aware of that fact. All three PSOs were union officers, Blake and Holland were members of the Union's bargaining committee, and Blake and Baker were involved in the protected activity of delivering the Union's strike notice to Colonel Hall. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978) (employees engage in protected activity even when "they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship").

Instead of specifically finding union animus on the part of the Respondent, the judge inadvertently characterized the final element of the General Counsel's initial burden as proving that the three PSOs were fired because of their protected activity on January 31. As indicated above, it is the General Counsel's initial burden to show that the PSOs' protected activity was a motivating factor in the Respondent's actions; demonstrating antiunion animus is one element of that showing.

The judge's misstatement of the test does not undermine her ultimate finding because the General Counsel amply proved the Respondent's antiunion animus. First, as the judge found, a member of the Union's negotiating team testified without contradiction that during contract negotiations, the Respondent's president, Leslie Kaciban, threatened to fire all members of the Union's bargaining team. Second, Fields' decision to notify Dingman that a PSO engaged in the protected activity of delivering the strike notice to Colonel Hall reveals that Fields acted to jeopardize the employment of the PSOs and further evinces the Respondent's animus.[11] As both Fields and Dingman had previous knowledge of the strike notice, his disclosure did not serve to notify Dingman of the strike. Third, when Fields told Dingman about the PSOs' protected activity, she did not contact Colonel Hall, which would have been a straightforward approach to finding out whether a PSO had provided details of the strike notice, were that Dingman's real interest. Instead, Dingman's investigation was aimed at uncovering whether and which PSOs had engaged in protected activity, and her interviews of the three PSOs included interrogations of the PSOs about that protected activity. In these interviews, she also denigrated a Board settlement agreement prohibiting the Respondent from restricting the PSOs from directly contacting tenants, and threatened

among them a security violation committed when the plaintiff was employed by the Federal Air Marshal Service (FAMS). The court denied the Government's motion to dismiss, finding "no evidence in the record that the CBP considered national security . . . as a basis for plaintiff's termination." Id. at 117. See also *Delgado v. Ashcroft*, 2003 WL 24051558 (D.D.C. 2003).

[10] Courts treat nonjusticiability as an affirmative defense, with the proponent having the burden of proof. See *Jones v. Ashcroft*, supra, 321 F. Supp. 2d at 8 ("[T]here is nothing in the record . . . to indicate that the FBI's suitability determination was made with any 'predictive judgment' about whether hiring [applicant] would implicate national security concerns."); *Corbett v. Napolitano*, supra, 897 F. Supp. 2d at 117 ("[T]here is no evidence in the record that the CBP considered national security or [employee's] ability to obtain a security clearance as a basis for [employee's] termination.").

[11] Dingman essentially admitted that Fields probably contacted her because of Blake's union activity in delivering the strike notice—not because a PSO had visited the colonel. When asked whether Fields would have acted differently if a PSO had brought in a birthday present instead of a strike notice, Dingman testified, "I can only speculate that it would be different because I can't imagine anybody calling me to tell me that a PSO had taken a birthday present in."

that a strike would result in the PSOs' termination and inability ever to work again on a Federal contract.

Tellingly, Edmiston witnessed Dingman's animus firsthand during the February 22 interviews. Edmiston also saw it reflected in Dingman's report recommending the termination of the three PSOs, including references to the PSOs "tak[ing] orders from NLRB and disregard[ing] what Paragon says" and "hav[ing] their own agenda . . . handling their own personal grievances." Although Dingman had accused the PSOs of violating certain asserted security rules by using their credentials to enter the Savannah facility, Edmiston knew that Baker, Blake, and Holland had denied being aware of any such rules. Nonetheless, the Respondent failed to consider their assertion, such as by investigating the widespread practice by off-duty PSOs of bypassing the screening process.[12] Moreover, as the judge found, the Respondent's managers were already aware that it was a common practice for PSOs to use their employee credentials to enter the facility while off-duty without being screened.[13] Yet, Edmiston signed the PSOs' suspension letters, without questioning Dingman's conclusions, and the PSOs were subsequently terminated without any further consideration.

The judge also discredited the testimony of the Respondent's General Counsel, Laura Hagan, that the Respondent had no choice but to discharge Blake, Baker, and Holland because of Dingman's recommendation. The judge thus found that the Respondent's claim that it had no choice but to discharge the PSOs was pretextual. See, e.g., *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991) (inferring unlawful motive from employer's false or pretextual reasons given for its action), enfd. mem. 976 F.2d 744 (11th Cir. 1992).[14] We find no basis for reversing the judge's finding. Moreover, an employer's interest in maintaining a contract is not a legitimate business reason where, as here, a contractor requires the employer to discriminate against employees on the basis of their Section 7 activity. *Dews Construction Corp.*, 231 NLRB 182, 182 (1977) (finding discharge of union employee unlawful where contractor told employer that job was "nonunion" and "[y]ou better remember how your contract was written"), enfd. 578 F.2d 1374 (3d Cir. 1978), decision supplemented on other grounds 246 NLRB 945 (1979). For the foregoing reasons, we find, in agreement with the judge, that the General Counsel demonstrated that the PSOs' union activities were a motivating factor in their suspensions and discharges.

We also agree with the judge, for the reasons stated in her decision, that the Respondent failed to show that it would have taken the same actions in the absence of the employees' union activities. We reject the Respondent's contention that it demonstrated it would have terminated the PSOs, even in the absence of their union activities. The Respondent states that Baker and Holland's discipline was justified because they lied to Dingman about the protected activity of delivering the strike notice. We disagree. Holland and Baker had a reasonable basis for believing that Dingman was attempting to pry into protected union activity and that they would suffer reprisal for that activity. Under these circumstances, Holland and Baker were under no obligation to respond to questions seeking to uncover protected activities. See, e.g., *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003) (finding no obligation to respond truthfully to employer's questioning that lacked a valid purpose), enfd. 387 F.3d 908 (D.C. Cir. 2004); *St. Louis Car Co.*, 108 NLRB 1523, 1525–1526 (1954). An employer may not discharge an employee for lying in response to such questions. *Tradewaste Incineration*, 336 NLRB 902, 907 (2001).[15] Here, the Respondent knew that Dingman's

[12] In affirming the judge's analysis of the Respondent's failure to adequately investigate the alleged misconduct, we additionally rely on *Management Consulting, Inc.*, 349 NLRB 249, 264 (2007) (failing to obtain employee's version of events and ignoring exculpatory facts evidence unlawful motive), and *Airport 2000 Concessions, LLC*, 346 NLRB 958, 978 (2006) (failing to adequately investigate alleged misconduct evidences unlawful motive) (quoting *Washington Nursing Home*, 321 NLRB 366, 375 (1996)). We note that *Relco Locomotives, Inc.*, 358 NLRB No. 37 (2012), enfd. 734 F.3d 764 (8th Cir. 2013), upon which the judge relied in part, was decided by a Board that was improperly constituted, but was enforced by the Eighth Circuit.

[13] In adopting the judge's finding that the Respondent's supervisors observed the PSOs' common practice of using their credentials to enter Federal facilities without being screened, we do not rely on the fact that the Respondent's sergeants were among the individuals who observed this practice. The sergeants were not proved to be supervisors, and thus their knowledge of the practice cannot be imputed to the Respondent.

[14] Although it is not necessary to our decision, we agree with the judge that it is appropriate to impute Dingman's antiunion animus to the Respondent. Dingman's report, on which the Respondent relied, contained several statements evincing her own animus, such as her disparaging statements to Blake and Baker about the settlement agreement with the Board and her mischaracterization of the PSOs' conduct as "their own agenda" and "personal grievances." It is well settled that an employer violates the Act when it follows the direction of another employer with whom it has business dealings to discharge its employees because of their union activities. See, e.g., *Black Magic Resources, Inc.*, 312 NLRB 667, 668 (1993), decision supplemented 317 NLRB 721 (1995). The fact that the direction comes from a Government actor does not alter our analysis.

[15] This case is materially distinguishable from *Fresenius USA Mfg. Inc.*, 362 NLRB No. 130 (2015). There, the Board found unprotected an employee's dishonesty during the employer's legitimate investigation of facially valid and serious complaints of employee misconduct, even though the misconduct took place during the employee's union activity. Id., slip op. at 1–2. Here, by contrast, the Respondent already knew the Union had issued a strike notice and had no legitimate reason for investigating the PSOs' protected actions in informing Colonel Hall about the strike notice.

recommended discipline of Baker and Holland was based on their lack of candor about their protected activity, yet it followed her recommendation and unlawfully discharged them.

Finally, we find no merit in the Respondent's assertion that the Respondent lawfully disciplined Blake for impermissibly parking his vehicle in the loading dock and speaking to on-duty PSOs for 12 minutes. Neither the suspension form nor the discharge notice lists these infractions as grounds for his discipline. Thus, regardless of whether Dingman recommended removal based on these infractions, the Respondent's argument fails because it did not cite these alleged infractions in its disciplinary notices. With respect to Baker's responsibility for enforcing the loading dock area rules, the Respondent has failed to show that this would provide a basis for discharge. Moreover, we are skeptical of the Respondent's contention that these infractions posed a grave threat to the safety of those in the facility, given that Dingman took more than 3 months to recommend the PSOs' removal (during which time Edmiston took no action against these PSOs and permitted them to continue to work). Accordingly, we find no merit in the argument that the Respondent was compelled to discharge the PSOs because they purportedly posed a safety risk.

Accordingly, for the foregoing reasons, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending and then discharging Blake, Baker, and Holland.

ORDER

The National Labor Relations Board orders that the Respondent, Paragon Systems, Inc., Savannah, Georgia, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against employees for supporting United Security and Police Officers of America or any other labor organization.

(b) In any like or related manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Arthur Blake, Joel Baker, and John Holland full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Arthur Blake, Joel Baker, and John Holland whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Arthur Blake, Joel Baker, and John Holland for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and discharges of Arthur Blake, Joel Baker, and John Holland, and within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(e) Within 14 days from the date of this Order, notify the Federal Protective Service of this Decision and Order.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Savannah, Georgia facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current em-

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees and former employees employed by the Respondent at any time since July 10, 2012.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, concurring.

The threat posed by terrorism is one of the most pressing issues facing the United States today. In light of this threat, national security concerns occupy a position of paramount importance, even in regard to Federal labor policy. And here in the circumstances of this case, the Federal Protective Service (FPS) plays a central role in maintaining national security by protecting Federal buildings and monitoring access to those buildings. FPS "protect[s] the homeland by managing risk and ensuring continuity for one of the most crucial elements of our national critical infrastructure—the people and our nation's Federal Facilities."[1] The Respondent's Protective Security Officers (PSOs) are essential to the mission of FPS because they are the persons responsible on a daily basis for enforcing the security rules at the buildings that they guard. Thus, FPS insists that the PSOs adhere closely to those security rules, and rightly so. Indeed, if we do not have a solid security force protecting federal property, then we are vulnerable to terror attacks, as the 2015 Tennessee terrorist attack, and the 2013 Washington Navy Yard and 2009 Fort Hood mass killings made tragically clear. Many Federal agencies have recently undertaken changes in security procedures to further strengthen our defenses against the ever-increasing threat of terrorism, both domestic and foreign.[2] Against this background, I believe the Board risks doing a great disservice to the nation by sanctioning an employer that acted in conformance with the FPS' high standard of conduct for PSOs charged with such grave duties. Accordingly, I believe the Board should take great care in determining whether an employer met its *Wright Line*[3] rebuttal burden in these circumstances. Specifically, substantial weight should be given to national security concerns when raised by a contractor in defense of disciplinary action recommended by a Government agency.

However, my colleagues are right, and I agree with the judge that credited evidence here shows that the Respondent's reliance on the FPS report here was pretextual. There is evidence that the Respondent contacted FPS Representative Jennie Dingman in the first place in response to PSO Blake's union activity. The Respondent's representative Edmiston witnessed Dingman interrogating the PSOs regarding their union activity during Dingman's interviews with them, and then the Respondent relied on Dingman's recommendation knowing it was based on her animus. Thus, the Respondent was aware that Dingman's report was based on her antiunion animus. Further, there is credited evidence that direct threats were made to fire strikers during each officer's investigatory interview in the presence of Edmiston.[4]

In sum, the credited evidence indicates that the Respondent's officials knew about *and shared* Dingman's pronounced animus against the 3 PSOs—officers of their local union—because of a threatened strike, and that was the reason both for the investigation and the Respondent's unquestioning acceptance of the removal recom-

[1] Department of Homeland Security's website, available at http://www.dhs.gov/topic/federal-protective-service.

[2] For example, the Transportation Security Agency has continued to make changes to security procedures to address the continual threat to commercial aviation. *TSA Unveils Enhanced Security Screening Procedures and Changes to the Prohibited Items List*, available at http://www.tsa.gov/es/node/537. Recently, the Department of Homeland Security ordered the TSA to revise its security procedures after screeners at airport checkpoints failed to detect weapons and other prohibited items 95 percent of the time in a covert test. ABC News website, available at http://abcnews.go.com/US/exclusive-undercover-dhs-tests-find-widespread-security-failures/story?id=31434881. Due to concern over the rise in cyber-attacks, the Department of Homeland Security and U.S. Customs and Immigration Enforcement have blocked personal webmail accounts on Government computers. *Exclusive: Cash for Slackers, Part III*, available at http://www.foxbusiness.com/economy-policy/2015/06/03/fox-business-exclusive-cash-for-slackers-part-iii/. In response to national security concerns, the Department of Energy created the National Nuclear Security Administration to oversee the department's national security-related programs, including nuclear weapons labs. AllGov, available at http://www.allgov.com/departments/department-of-energy?detailsDepartmentID=565.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[4] In its brief, the Respondent argues that Edmiston was not involved in the decision to discharge the PSOs. However, that argument lacks merit because Edmiston signed the PSOs' suspension notices.

mendation as grounds for discharging them.[5] They also knew that it was common practice for PSOs to use their employee credentials to enter the facility while off-duty without being screened, one of the alleged grounds for removal and discharge of the PSOs. All of this strongly supports the judge's finding that the Respondent's reliance on the FPS report was pretextual. Necessarily, then, the report was not a legitimate factor for consideration of whether the Respondent met its *Wright Line* rebuttal burden, so this is not a scenario where the Board would be incorrectly substituting its judgment regarding the Respondent's decision to follow the Federal Government's recommendation on a matter of national security. Cf. *Department of Navy v. Egan*, 484 U.S. 518, 528–529 (1988) (decisions by Executive Branch personnel about security involve an act of "predictive judgment" that "must be made by those with the necessary expertise in protecting" the security interests at issue in any particular security-related decision).

Accordingly, I concur with my colleagues in affirming the judge's finding that the Respondent committed the alleged violations.

Dated, Washington, D.C. August 26, 2015

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against you for supporting United Security Police Officers of America or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Arthur Blake, Joel Baker, and John Holland full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Arthur Blake, Joel Baker, and John Holland whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest compounded daily.

WE WILL compensate Arthur Blake, Joel Baker, and John Holland for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Arthur Blake, Joel Baker, and John Holland, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, notify Federal Protective Service of the Board's Decision and Order.

PARAGON SYSTEMS, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-095371 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[5] I find no need to go beyond the particular facts of this case in addressing whether the failure to conduct an investigation of alleged misconduct warrants the inference of unlawful motivation.

Elaine Robinson-Fraction, Esq. for the General Counsel.
Thomas P. Dowd, Esq., for the Respondent.
Jacqueline K. Taylor, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HEATHER JOYS, Administrative Law Judge. This case was tried in Atlanta, Georgia, from December 4–6, 2013. Arthur J. Blake filed the charge on December 19, 2012, and the General Counsel issued the complaint on September 18, 2013. Respondent filed a timely answer denying the essential allegations of the complaint.

The complaint alleges Respondent, Paragon Systems, Inc., discharged three employees—Charging Party Arthur Blake, Joel Baker, and John Holland—because of their union activities. Respondent denies the allegation, asserting that all three employees were fired for breaches of their security duties and lack of candor in an investigation of those breaches.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION[1]

Respondent, Paragon Systems, Inc., is an Alabama corporation in the business of providing armed guard and security services. It contracts with the Government, primarily the Department of Homeland Security, Federal Protective Services (FPS). (Tr. 296.)[2] During the past 12 months, a representative period, Respondent has performed services for the Government in the State of Georgia valued in excess of $50,000. Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I find, at all times material here, Director of Human Resources Nicole Ferritto; Contract Manager Vernon Fields; and Assistant Contract Manager Veronica Edmiston were supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act.

The parties admit, and I find, the United Security and Police Officers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent's primary business is providing security guards to various agencies of the Federal Government under contracts with FPS. (Tr. 296.) FPS is Respondent's largest client. Respondent, in turn, is a party to approximately 40 percent of FPS's contracts for security services. (Tr. 305–306.) Under these contracts, security guards hold the title of protective security officer or PSO. Nationwide, Respondent employs approximately 5400 PSO's. (Tr. 297.) In Georgia, Respondent employs 340 PSO's to provide services to 66 facilities. (Tr. 484.)

B. Respondent's Contract with the Federal Government

Contracts between Respondent and FPS have a 5-year term. (Tr. 299.) However, every 6 months, Respondent is evaluated on compliance and a contractor performance assessment report is prepared by the Government every year. (Tr. 307; R. Exh. 4, p. 68.) In addition, the contractor and FPS representatives are required to meet at least once per year to discuss contract performance issues. (R. Exh. 4, p. 6.) Laura Hagan, Respondent's general counsel, testified that the most important factor assessed in these evaluations is the responsiveness of the contractor to FPS requests. (Tr. 308.) Responsiveness is also a consideration when a contractor is bidding to renew a contract.

Every contract between Respondent and FPS contains a "Statement of Work." (Tr. 305.) This "Statement of Work" governs, among other things, the qualifications and expected conduct of PSO's. (R. Exh. 4.) PSO's must meet certain minimum qualifications, undergo a formal "adjudication" by FPS, meet certain medical requirements, undergo training, and pass a series of examinations in order to perform work on the contract. (R. Exh. 4, pp. 9–10.) In addition, the "Statement of Work" mandates PSO's follow FPS's security guard information manual (SGIM) and the rules of conduct set out therein. (Tr. 305; Jt. Exh. 2; R. Exh. 4.)

As required under the "Statement of Work," section 7 (R. Exh. 4, p. 21), Respondent has individuals within Georgia responsible for oversight of its contracts within the State. At all relevant times, the program manager for Georgia was Vernon Fields. (Tr. 483.) Fields had been an employee of Respondent for the previous 5 years. His responsibilities included oversight of PSO's employed by Respondent within Georgia ensuring that personnel assigned to work on the contract followed the rules and codes of conduct. (Tr. 483–484.)

Fields' assistant was Veronica Edmiston. Edmiston had been employed by Respondent for 7 years. (Tr. 531.) Prior to becoming Fields' assistant, she had been a contract manager in Alabama and South Carolina. She became assistant contract manager for Georgia in 2008. Her primary responsibility was oversight of the 25 facilities for which Respondent had contracts in the southern part of Georgia. (Tr. 532.)

FPS also employs individuals to oversee the performance of the PSO's onsite. The FPS official with daily oversight of the contract between Respondent and FPS in Georgia during the

[1] The Respondent raised in its answer and in a footnote in its brief that any actions taken by this Board, including its agents and delegates lacks authority because the court in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12–1281), found the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid. Thus, according to Respondent, the Board lacks a quorum. The Board does not accept the decision in *Noel Canning*, in part, because there is a conflict in other circuits regarding this issue. See *Belgrove Post Acute Care Centers*, 359 NLRB No. 77, slip op. at fn. 1–2 (2013). Furthermore, the Board has determined that while the question regarding the validity of the recess appointments remains in litigation and pending a definitive resolution it will continue to fulfill its obligations under the Act. See *Bloomingdale's, Inc*., 359 NLRB No. 113 (2013); *Puna Geothermal Venture*, 359 NLRB No. 87 (2013).

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibits; "Jt. Exh." for Joint exhibits; "R. Exh." For Respondent's exhibits; and "CP Exh." for Charging Party exhibits.

relevant time period was Jennie Dingman. Dingman's title was contract officer's technical representative (COTR). Dingman in turn reported to Lawanna Nunnally whose title was contract specialist. (Tr. 434.) Ultimately, Nunnally reported to the contracting officer (CO), who was Michael DeCrescio. (Tr. 434.)

Dingman had been an employee of FPS since May of 2003. (Tr. 378.) She held several positions before being promoted to the COTR position for Georgia in October 2011. (Tr. 378.) Her duties as COTR included monitoring work on the contract and being the technical representative for FPS in Georgia. She physically inspected the various buildings over which she had oversight upon request. (Tr. 379.)

During the relevant time, Respondent's contract with FPS for Georgia included providing security to a Federal facility in Savannah that housed the Army Corps of Engineers (the ACE facility). This was a limited access facility with three secured entrances and five security guard stations or "posts." (Tr. 135.) There are three posts at the main entrance and one each at the loading dock and garage. (Tr. 136.) Guards serve 30-minute shifts at each post, rotating from post to post throughout the day. (Tr. 135.)

C. The Alleged Discriminatees

The complaint alleges three individuals were discharged in violation of Section 8(a)(3) and (1) of the Act for assisting the Union and engaging in concerted activity. These three individuals were Arthur Blake, the Charging Party, Joel Baker, and John Holland. Each served as PSO's at the ACE facility in 2012.

Arthur Blake had been an employee of Respondent from April 1, 2008 until his discharge on July 12, 2012. (Tr. 29.) He had worked in various capacities and at various locations throughout his tenure. Prior to his assignment to the ACE facility, he had served in managerial positions, including as a lieutenant and sergeant. (Tr. 30.) He stepped down from his lieutenant position in 2009, and from his sergeant position in 2011. (Tr. 65–67.) At his final post, he served as a PSO. Blake also served as interim union president during the relevant time period and as a member of the bargaining committee. (Tr. 31.) There is no evidence that, prior to his suspension and termination in July of 2012, Blake had been disciplined by Respondent.

Joel Baker was also employed with Respondent from April 2008 through July 2012. (Tr. 133.) During his tenure, he served as a PSO at the ACE facility in Savannah. (Tr. 133.) Baker also served as secretary of the Union from December 2011 through July 2012. (Tr. 134.) There was no evidence presented that, prior to his suspension and discharge, Baker had been subject to disciplinary action by Respondent.

John Holland was similarly employed by Respondent from April 2008 through July 2012. (Tr. 191.) His most recent assignment had been as a PSO at the ACE facility. He also served as interim vice president of the Union and was a member of the bargaining committee. (Tr. 192.) As with Blake and Baker, no evidence of any prior discipline of Holland was presented.

D. Prior Board Charges

In March 2011, Respondent entered into a settlement agreement with the Board to resolve allegations in a charge filed by Blake. (GC Exh. 6.) In this agreement, Respondent agreed to revise its "Chain of Command" rule. The prior rule prohibited employees from directly contacting Respondent's clients or clients' customers for any reason. (GC Exh. 4.) The new chain of command rule contained no such prohibition. (GC Exh. 5, p. 17.)

E. The 2012 Contract Negotiations

The United Security Police Officers of America (the Union) is the exclusive bargaining representative of PSO's employed by Respondent in Georgia. (Tr. 30.) Under the collective-bargaining agreement in effect from April 1, 2012, through March 31, 2015, Respondent recognized the Union as the exclusive bargaining representative of the following unit:

> All armed and unarmed security officers employed by Paragon Systems performing guard duties as defined by Section 9(b)(3) of the National Labor Relations Act, assigned to federal facilities throughout the State of Georgia under the company's contract HSCEE4-08-A-0001 with the Department of Homeland Security, Federal Protective Service . . . excluding office clericals, managerial personnel, confidential personnel, supervisors (Lieutenants and Captains) . . . and all other personnel. It is expressly agreed and understood between the parties that persons enrolled or participating in pre-hire training programs offered by the company shall not be considered employees. . . . (Jt. Exh. 1.)

This collective-bargaining agreement was entered into by the parties in February of 2012. (Tr. 39.)

The Union had been the exclusive bargaining representative for unit employees since December 2011. Previously, the International Union Security Police Fire Professionals of America had been the bargaining representative for the PSO's. The prior collective-bargaining agreement included sergeants in the unit. Sergeants were excluded from the unit under the new agreement. The prior contract with that union expired on July 1, 2011. (R. Exh. 17.)

In January 2012, Respondent and the Union entered into contract negotiations for the current agreement. (Tr. 31.) The Union had an 11-member negotiating team. Among the members of that team were Blake and Holland. Respondent's negotiating team consisted of Respondent's president, Leslie Kaciban, Respondent's director of employee relations, Roman Gumul, Fields, and Edmiston. Although details of the negotiation were not made part of the record, testimony established these negotiations were heated at times. John Kabakova, a member of the Union's negotiating team, testified without contradiction that Kaciban threatened to fire all of the Union's team during these negotiations. (Tr. 277.)

In the midst of negotiations, on January 22, 2012, the Union issued a strike notice which it forwarded to all the bargaining committee members. (Tr. 33, 72; GC Exh. 3.) Fields testified that once the strike had "been made public" the COTR requested Respondent provide FPS with a contingency plan, which it did. (Tr. 510.)

Blake testified after the Union issued the strike notice, he had a conversation and exchanged emails with Gumul and Kaciban. (Tr. 73.) In these exchanges, the parties agreed to return to bargaining. The parties met first via telephone and then in person on February 16, 2012. (Tr. 73.) Ultimately, the parties reached agreement and entered into a new collective-bargaining agreement on March 19, 2012. (Jt. Exh. 1.)

F. The Events of January 31, 2012

Although Blake, Baker, and Holland were not discharged until July 2012, Respondent set forth in its termination notices they were discharged because of events that occurred in January and February of 2012. These events are largely undisputed.

On January 31, 2012, Blake, who was off duty that day, arrived at the loading dock area of the ACE facility around 12:30 p.m. (Jt. Exh. 4; Tr. 39.) The loading dock consists of two bays with an overhead door. A personnel ramp leads to the dock at which a single guard post is located. (Tr. 135.) At this guard post is an x-ray machine and a magnetometer.[3] (Tr. 135.) Blake parked his car in the loading dock and proceeded to the guard's desk. (Tr. 40.) He was neither in uniform nor carrying a weapon. (Tr. 40.) On duty at that time was Baker. (Tr. 40.) Baker handed Blake some documents, checked his credentials,[4] noted Blake's presence on the officer's operations log or 1103 form, and allowed Blake entry into the building without going through the magnatrometer or having him place his packages on the x-ray machine. (Tr. 40; 138; 165; Jt. Exh. 4.)

The loading dock walls display multiple signs. Posted at the double doors leading into the building is a sign that indicates the entrance is not an authorized pedestrian entrance and directs pedestrians to the main or York Street entrance. (R. Exhs. 13 and 14.) There is also a sign at the back wall, behind the guard's desk. It reads "15 minute parking only" and "for vehicles loading/unloading." (R. Exh. 15; Tr. 399.) It further directs that once loaded or unloaded, a vehicle must be moved. There is no dispute each of these signs was in place on January 31, 2012.

Once in the building, Blake proceeded unescorted to the office of Colonel Jeffery Hall, the highest ranking official for the Army Corps of Engineers in Savannah. (Tr. 39.) After a short wait, Blake was able to see the Colonel. (Tr. 43.) Blake testified he discussed the contents of the packet with the Colonel, including the strike notice. (Tr. 44.) Blake further testified the Colonel told him he would be taking steps to obtain a contingency plan in the event of a strike by the PSO's. (Tr. 44.)

At approximately 1 p.m., or 30 minutes after his arrival, Blake returned to the loading dock. (Tr. 45; 139; 168.) At that point, Holland had arrived to relieve Baker. (Tr. 139.) The three men had a conversation lasting approximately 12 minutes. (Jt. Exh. 3, p. 9; Tr. 45; 169; 216.) Blake then left the facility in his car.[5]

Prior to departing, but while still at the loading dock, Blake also had a conversation with FPS Inspector Beuning. (Tr. 46.) Blake testified that Beuning was in uniform, from which he deduced he was on duty. Blake testified Beuning asked him whether he was on or off duty and Blake responded that he was off duty. (Tr. 46.) Beuning asked Blake whether he was conducting union business to which Blake responded, "no," that he had just dropped off a packet to the Colonel. (Tr. 46.) Otherwise, Beuning asked no other questions of Blake regarding his business at the facility and made no comment about his having used the loading dock to enter the building. (Tr. 47.) Although Holland confirmed he witnessed this conversation, he testified he could not hear it. (Tr. 192.) Beuning did not testify.

G. The Investigation

On February 17, 2012, Fields called Dingman to inform her PSO had contacted the Colonel at the ACE facility to inform him of a potential strike. (Tr. 382; Jt. Exh. 3.) Fields testified he called Dingman because he had heard rumors someone had notified the tenant agency at the ACE facility of a potential strike. (Tr. 490.) Upon receiving the call, Dingman testified she felt it necessary to investigate whether a strike was about to take place in order to determine whether FPS would need to develop a contingency plan to provide security to the ACE facility. (Tr. 384.) Further, she testified she felt the most efficient manner to do so would be to contact the security guards at the ACE facility directly.

Dingman first called the security desk at the front entrance to the ACE facility. PSO Lynn Michael answered the call. (Tr. 385.) Dingman asked Michael whether he knew of a PSO delivering a strike notice to the Colonel. He responded he did not. She then asked who else was working and, when informed Holland was working, she asked to speak with him. Dingman asked Holland whether anyone had been to see the Colonel within the last few days, to which Holland responded "no." When she changed her question to ask whether a PSO had been to see the Colonel at any time to discuss a possible strike, Holland told her he was aware someone had dropped some paperwork off with the Colonel, but he did not know who or when. Dingman testified she found Holland's responses to be evasive. (Tr. 385.) Following this conversation, Dingman decided to go to the ACE facility to conduct interviews. Dingman did not contact the Colonel to ask him who had brought him the notice. (Tr. 453.)

Dingman went to the ACE facility on February 22, 2012, to begin to conduct an investigation. Prior to going to the facility, Dingman called both her supervisor, John Hathaway, and Edmiston. (Tr. 385.) Her intention was to have both present for interviews.

Dingman conducted her interviews in the PSO breakroom at the ACE facility. Upon first arriving at the breakroom, Dingman found Baker already there. (Tr. 387.) Dingman informed him he would be interviewed at that time. According to Baker, he first asked to speak with a union representative, but Dingman denied the request saying this was not a union matter.

[3] The X-ray machine scans packages and the magnetrometer scans people.

[4] Blake testified that he had on him his common access card, his GSA badge, and his 24-hour access card. (Tr. 42.) However, he did not state which of these he presented to Baker.

[5] A video surveillance tape of the loading dock security area was reviewed by Dingman, among others. Dingman did not provide testimony that disputed the version of events presented by Blake, Baker, or Holland with regard to Blake's entry into the facility or the length of any of the conversations.

(Tr. 176.) Baker next asked to talk with a company representative to obtain permission to speak with Dingman. (Tr. 176–177; 388; Jt. Exh. 3.) Dingman allowed him to call Edmiston. (Tr. 388.) Edmiston was scheduled to be there, but had not yet arrived. When reached on her cell phone, Edmiston told Baker to go ahead with the interview. (Tr. 177; 388.)

Dingman testified she found Baker to be evasive initially. (Tr. 389–390.) Specifically, she testified Baker responded to her questions with questions, rather than answers. However, after Edmiston arrived and after Dingman told Baker his actions "could be construed as obstructing an investigation," he became, in her assessment, more forthcoming. (Tr. 389–390.) Ultimately, Baker told Dingman Blake had come to the building "much earlier" than her question had implied. (Tr. 142.)

Baker also informed Dingman he had made a notation of Blake's visit on the 1103 form at the time of his arrival. (Jt. Exh. 3.) At that point, Edmiston reviewed these forms and found the exact date Blake had come to the building. Hathaway also obtained the video surveillance tape of the loading dock for January 31, 2012, and he, Dingman and Edmiston reviewed it. (Jt. Exh. 3.)

During this interview, Dingman asked Baker several questions about his understanding of the rules of conduct for PSO's. Dingman asked Baker why he had allowed Blake to use the loading dock entrance. (Tr. 142; 392.) Baker responded it was his understanding the loading dock could be used for building access as long as the individual employee did not intend to be there more than 15 minutes and had his Government issued credentials. (Tr. 392.) It was during this part of the interview that Dingman informed Baker such credentials were to be used for work purposes only; reminding him he had been previously so trained. (Tr. 183; 405; Jt. Exh. 3.) Baker testified Dingman also informed him that off-duty PSO's were to be treated as visitors for purposes of entry into the building. (Tr. 184.) Baker told Dingman he was unaware of that rule, but would follow it in the future. (Tr. 184; Jt. Exh. 3.) Dingman also asked Baker whether he was aware he was not to speak directly with tenants of the building in which he worked. (Tr. 142; Jt. Exh. 3.) Baker responded PSO's had a "ruling" from the "NLRB" stating restricting PSO's from speaking with the client was "unlawful." (Jt. Exh. 3; Tr. 143.) Dingman then asked Baker whether he took his orders from Respondent or the "NLRB." (Tr. 143; Jt. Exh. 3.) Baker responded he took orders from Respondent "with in [sic] the parameters of the law." (Jt. Exh. 3.)

At some point in the interview of Baker, the issue of the strike was also discussed. Baker testified Dingman stated to him if the Union were to strike, the PSO's could be removed from the contract and would never work another Federal contract again. (Tr. 141; 185.) Dingman testified she made a statement to Baker to the effect he "ran the risk" of not being able to work another Federal contract if he participated in a strike. (Tr. 408.)

The same day, Dingman interviewed Blake. (Tr. 409.) According to Dingman's report, Blake told her he was the PSO who had delivered the strike notice to the Colonel. (Jt. Exh. 3, p. 5.) Blake told Dingman he had come to see the Colonel because the Colonel was mentioned in a letter Blake had written to the President of the United States about the PSO's working conditions, and Blake felt the Colonel should be informed of past events leading to the writing of that letter and the strike vote. (Jt. Exh. 3, p. 5.) The packet of materials Blake delivered to the Colonel did contain correspondence dating back to early 2011 as well as a letter to President Obama. (GC Exh. 2.)

During her interview of Blake, Dingman also asked him about his understanding of certain rules of conduct for PSO's. Dingman wrote in her report that she asked Blake about "the NLRB saying it is illegal for PSO's to be told they cannot converse company or personal business to tenant Agencies" to which he responded, "yes." (Jt. Exh. 3, p. 5.) Blake testified he told Dingman he had sent a copy of the settlement to Edmiston and Edmiston offered to forward a copy to Dingman. (Tr. 48–49.) Dingman also asked Blake whether he understood he could not use his Government issued credentials for personal business to which Blake responded, "no." (Jt. Exh. 3.) She asked Blake whether he understood he could not fraternize or converse about personal business while on post, to which Blake responded he understood he was to keep such conversation to a minimum. Finally, she asked whether he understood using his credentials to enter the building through the loading dock was a misuse of his credentials, to which he responded, "no."

Dingman's report also indicates she and Blake discussed Blake having previously entered Federal buildings off duty, both in and out of uniform. According to the report, Blake told Dingman he did not believe doing so constituted any type of rule violation. (Jt. Exh. 3, p. 6.) Dingman wrote in her report Blake "showed no remorse" for his actions and "continued to believe everything he had done was acceptable." (Jt. Exh. 3, p. 6.) Dingman similarly testified she perceived Blake as unconcerned with her investigation because, in his mind, he had done nothing wrong. (Tr. 409.)

Blake testified, in discussing the strike, Dingman told him if the union did strike, the PSO's would lose their jobs and never be able to work on another Federal contract. (Tr. 49.) Blake testified, although present, Edmiston made no comments when Dingman made this statement. Dingman did not deny making this statement.

Dingman returned to the ACE facility on the following day to interview Holland. (Tr. 414; Jt. Exh. 3, p. 7.) Dingman testified she initially confronted Holland about the telephone conversation in which he had claimed only to know that a PSO had dropped some information off to the Colonel. (Tr. 416.) According to Dingman's report, Holland admitted he had not told her he knew Blake had been to see the Colonel because he "didn't want to get in trouble." (Jt. Exh. 3, p. 8.) As with the other two interviews, Dingman asked Holland about his understanding of the use of his Government issued credentials for personal use, socializing on post, and allowing Blake to enter the building through the loading dock and without screening him. (Jt. Exh. 3, p. 8.) As with Baker and Blake, Holland responded he did not understand using his Government issued credentials to enter a Federal building while off duty was improper. (Tr. 201.)

H. Dingman's Conclusions and Report

Dingman ultimately reduced her findings to a written report.

(Jt. Exh. 3.) In it, she summarized her interviews and stated her conclusions about the rule infractions committed by the three PSO's. She found Baker had allowed Blake to park in the loading dock, did not process Blake as a visitor, but allowed him access without screening, allowed Blake to enter a restricted area without an escort, and was not "forthcoming" in his responses during the investigation. (Jt. Exh. 3, pp. 3–5.) She found Blake had parked in unauthorized area, entered the building while off duty but did not do so as a visitor, entered a restricted area without an escort, and improperly used his Government issued credentials to enter the facility. (Jt. Exh. 4, pp. 6–7.) Finally, Dingman found that Holland had "blatantly lied" to her and socialized while on duty. (Jt. Exh. 4, p. 9.) Dingman's report details the interviews she conducted and contains each individual's written statement. The report does not make note of Dingman's comments regarding the strike.

Dingman's report specified Baker and Blake had violated certain provisions of the Code of Federal Regulations and the SGIM. With regard specifically to the SGIM, Dingman wrote that Baker, in not treating Blake as a visitor while off duty, violated section 2.2 of the SGIM which requires PSO's to "observe and monitor building occupants and visitors for compliance with the facility's posted rules and regulations." He also violated two other portions of section 2.2 by allowing Blake to park in the loading dock area. Specifically he violated a provision titled, "Traffic control" that states, "Depending upon your location and based on your post order, you may be required to direct traffic, control parking, issue courtesy traffic violation notices on federal property" and a provision titled "Unauthorized Access" which requires the PSO to "prevent, discover, delay and/or detain persons attempting to gain unauthorized access to the property. . . ." Dingman also found Baker had engaged in conduct listed as unacceptable in the SGIM. Specifically, Baker had violated rule 6 which lists as unacceptable conduct dishonesty which includes lying to one's supervisor; rule 9 which lists as disregarding orders; rule 10 which lists "immoral conduct or any other criminal act;" rule 13 which lists negligence of duty; rule 19 which prohibits the "unethical or improper" use of official authority, credentials or equipment; and rule 22 which requires PSO's to cooperate with Government officials or the employer during an official investigation. (Jt. Exh. 4, pp. 4–5.) Blake was similarly found to have violated rules 6, 9, 10, and 19. Holland was found to have violated rules 6 and 9 only.

Dingman's report ends with her conclusion that the actions of Blake, Baker, and Holland did not meet the "Government standards of this contract." (Jt. Exh. 4, p. 10.) She further wrote:

> They have their own agenda and have proven with their actions listed above the security of the Federal Facility for which they are assigned come second to handling their own personal grievances. It is my professional opinion as the COTR of this contract that all three PSO's be removed. They have less than stellar candor and have shown without a shadow of a doubt their disregard for the safety of the government's facility, information or employees." (Jt. Exh. 4, p. 10.)

Dingman testified that, immediately following the interviews, she spoke on the phone with Nunnally[6] about her concerns. However, Nunnally informed her she would take no action until she had seen a written report. On May 31, 2012, Dingman completed her report and forwarded it to Nunnally. Nunnally did not testify and there was no evidence presented to establish Nunnally brought the matter to the attention of the CO. Rather, Nunnally forwarded the report directly to officials for Respondent on July 6. (R. Exh. 5.) Dingman testified that approximately 3 months passed before she completed her report because she had attended a 2-week training session in the interim and because she had other duties. (Tr. 473.) The record is silent as to whether Nunnally forwarded the report to the CO or why a month passed before she forwarded it to Respondent.

I. The Decision to Discharge Blake, Baker and Holland

Hagan testified she was involved in the decision to terminate Blake, Baker, and Holland. She testified she received Dingman's report via email from Respondent's director of employee relations Nicole Ferritto on July 6, 2012. (Tr. 312.) She stated this was the first she had been made aware of these issues. (Tr. 313.) Hagan received the report on a Friday and discussed it the following week with Ferritto and Respondent's director of labor relations, Roman Gumul. (Tr. 313–314.) Neither Ferritto nor Gumul testified.

Hagan testified in reviewing Dingman's report, she considered its detail and conclusions. Specifically, she noted the allegations that the individuals had violated security, had not been candid in the investigation, and that Blake had shown no remorse were, in her assessment, all supported with factual detail. (Tr. 314–317.) Moreover, she testified she "completely agreed with" the conclusions reached by Dingman in her report. (Tr. 318.)

Hagan testified she concluded, based on the findings in Dingman's report, the conduct of the PSO's had a negative impact on their ability to do their jobs. (Tr. 318.) She specified because PSO's may be called upon to testify in court proceedings regarding events occurring on the job, a finding that they are untruthful "completely destroys their ability to do a fundamental part of their job." (Tr. 319.) Hagan testified she believed Dingman was "genuinely disturbed" by the PSO's conduct and she was as well. (Tr. 319.)

In addition to her concerns about what Dingman had found with regard to the PSO's dishonesty, Hagan testified it was also wrong for an off-duty PSO to use his credentials for access to the ACE facility. (Tr. 319–320.) She testified that doing so violated the SGIM at section 5.5. (Tr. 320; Jt. Exh. 2, p. 37.) She also stated the conduct violated Respondent's rules for personal conduct in the employee manual, but did not specify which rule. (Tr. 321.) She stated she interpreted the rule in the SGIM to limit the use of a PSO's credentials to allow access to the building only when on duty. (Tr. 323.) Hagan testified she interpreted Dingman's report to conclude the named PSO's no longer met the "contract criteria and constituted a security risk if they were to be retained under the contract." (Tr. 323.) She further testified she agreed with that conclusion.

[6] Dingman's report incorrectly identifies Nunnaly as the contracting officer. She, in fact, is a contracting specialist with less authority than a contracting officer.

Hagan also testified Respondent had no choice but to follow Dingman's recommendation. (Tr. 323.) She clarified, however, that under certain circumstances, Respondent would not have to follow such recommendations, such as if the recommendation was not supported by relevant facts. (Tr. 323.) She explained Respondent's recourse in such a situation would be to appeal to the CO who could overrule the COTR. Hagan testified Respondent chose not to do so here because the recommendation was supported by specific facts. (Tr. 324.) No one employed by Respondent conducted any further investigation. (Tr. 351–352.) Rather, Hagan testified she reviewed several documents, including the collective-bargaining agreement, noting that because FPS had requested the PSO's be removed from the contract, the grievance and arbitration provisions of the collective-bargaining agreement did not apply. (Tr. 324.) Although she was present for the three interviews, Edmiston did not speak to anyone about the investigation. (Tr. 368.)

Respondent first suspended Blake, Baker, and Holland on July 10, 2012. (GC Exhs. 8; 10; and 12.) Prior to their suspensions, the three PSO's continued to work their usual assignments. The suspension notices indicate the three were being suspended pending further investigation and were each signed by Edmiston. On July 12, 2012, Respondent discharged the three PSO's. (GC Exhs. 9 11; and 13. The discharge letters were signed by Ferritto and state the PSO's were being discharged at FPS's request.

J. Discipline of PSO's

The "Statement of Work" provides circumstances under which a PSO may be removed from work on the contract. The "Statement of Work" holds the contractor responsible for disciplinary action "as may be necessary" to maintain "standards of employee competency, conduct, appearance, and integrity." (R. Exh. 4, p. 43.) The COTR and the CO have the authority to direct the contractor to retrain, suspend, or remove an employee from work on the contract. (R. Exh. 4, p. 43.) Under this provision FPS may request the removal of a PSO from work on the contract and the contractor "must comply" in a timely manner (R. Exh. 4, p. 43). PSO's discharged on request of FPS may not invoke the grievance and arbitration provisions of the collective-bargaining agreement. (Jt. Exh. 1, p. 15.)

FPS in turn has a directive that addresses PSO removal from a contract. (GC Exh. 14.) This directive indicates it was developed to provide "a formal and standardized process to ensure the prompt and proper removal of PSO's who fail to conform to the requirements as outlined in the contract. . . ." (GC Exh. 14, p. 1.) Under this directive, all recommendations to permanently remove a PSO from a contract "shall go before a Review Board for final approval." (GC Exh. 14, p. 3.) The review board is a standing committee that meets weekly and consists of representatives from FPS's office of the principal legal advisor and the acquisition's division consolidated contracting group. (GC Exh. 14, p. 2.) The directive further states, "[n]o PSO shall be removed at the direction of the Government prior to obtaining approval of the Board." (GC Exh. 14, p. 5.) A PSO may be temporarily suspended, pending investigation and Board presentation, however, if the CO and the COTR determine the conduct requires such immediate suspension. (GC Exh. 14, p. 5.) Finally, the directive contains a form upon which formal requests for PSO removals are made. (GC Exh. 14, p. 7.)

Dingman testified she was familiar with this directive. (Tr. 440.) It was not followed in this case, according to Dingman, because Respondent chose to discharge Blake, Baker, and Holland without going through the formal process. (Tr. 441.)

Respondent also has a security officer handbook that contains rules of conduct and Respondent's progressive disciplinary policy. (GC Exh. 5.) With regard to rules of conduct, the handbook delineates major offenses, for which a violation may result in discharge "after unpaid suspension and management investigation" and minor offenses for which a violation may result in counseling or a written warning "in accordance with" Respondent's progressive discipline policy. (GC Exh. 5 at 48–50.) These rules of conduct are similar to and, in some respects, mirror the rules of conduct in the Statement of Work and the SGIM. (R. Exh. 4; Jt. Exh. 2.)

The handbook also contains Respondent's progressive disciplinary policy and procedures. (GC Exh. 5 at 52–54.) The procedure has four steps. These are, in order of severity, an oral reprimand; written reprimand; unpaid suspension; and termination. It contains a caveat that where a major offense has been committed, steps one and two may be combined. It also gives management the authority to immediately suspend a PSO pending an investigation for conduct such as physical attacks, threats of violence, theft, or harassment. Additionally, PSO's who commit acts of violence or "other egregious misconduct or serious safety violations" may be terminated, depending on the outcome of an investigation. The handbook also lists types of conduct for which discharge may be appropriate in the case of a first offense. These include, but are not limited to, refusal to submit to or failure to pass a random drug test; acts of or threats of violence; physical attacks; theft; or harassment. (GC Exh. 5, p. 52.)

The discharge notices Respondent issued to Blake, Baker, and Holland do not reference any prior discipline or the applicability of progressive disciplinary policy.

K. Rules Governing Off-Duty PSO's

Respondent contends Blake and Baker were discharged for violating rules governing entrance to a secure Federal facility by PSO's while off duty. The rules governing the manner in which PSO's allow any individual to enter a Federal facility are covered in the SGIM and in "post orders." The SGIM contains rules applicable to all PSO's and all facilities protected by FPS. Post orders are specific to the facility and, Dingman testified, are developed by the "facility security committee." (Tr. 467–468; R Exh. 1.)

Dingman testified that under the post orders for the ACE facility, an off-duty Government employee is allowed access without screening, but a PSO is not. (Tr. 202; 402.) However, the written post orders in the record for the ACE facility only detail the procedure for processing a visitor. (R. Exh. 1.) They do not define a visitor or specifically address how to treat off-duty employees or PSO's. Dingman and Hagan testified this distinction is based on an interpretation of the rules governing

use of Government issued credentials found in the SGIM. (Tr. 320.) Additionally, Fields and Edmiston testified that off-duty PSO's were to be treated as visitors, PSO's were aware of this rule, neither had ever witnessed a violation of the rule, and not following the rule was a significant security breach.

Respondent called Donald Holcomb, its corporate training officer, to testify about training of PSO's on this subject. He testified he trains PSO's that they can use their credential "only when they are on duty." (Tr. 566.) He went on to specify that PSO's are taught they cannot use their credentials to "get out of a ticket." (Tr. 569.) He went on to testify that when PSO's come to work, "whenever they come into the building . . . they are still required to go through the screening process because they're not on duty." (Tr. 571.) This suggests that PSO's are never allowed entry into the building without being screened as a visitor, as they are only on duty when they are on post. When asked specifically whether PSO's were trained that an individual with "any form of Federal credential can enter a Paragon protected building and use that Federal credential to circumvent the magnetometer and x-ray screening procedures," he responded, "No, because what I tell these guys is that you do not allow this person past you unless you're satisfied." (Tr. 574.) Holcomb had previously testified that when making this determination, the PSO is trained to check the identification and if "it grants them in the building and it's them and it's valid and all that kind of stuff, bypass the system." (Tr. 571.) I find this not only confusing, but inconsistent with other testimony that PSO's must be treated as visitors when off duty.

In contrast, several current and former PSO's testified that PSO's have used their credentials to by-pass screening to enter secure Federal facilities, including the ACE facility while off duty. (Tr. 57–72; 99–102; 201–207; 249; 268–280; 586–592.) In addition to testifying this was a wide spread practice, several individuals testified this was done in the presence of officials from FPS and management with Respondent. It is also undisputed that an FPS inspector spoke with Blake on January 31 as he was leaving the loading dock, and did nothing. Kabakova testified Fields was among Respondent's managers who witnessed such conduct and took no action. (Tr. 280; 596–592.)[7]

On this issue, I credit the testimony of Arrick Todman, a PSO working currently on the Georgia contract in Atlanta. (Tr. 588.)[8] Todman had been trained on the SGIM as recently as 2011. (Tr. 587.) He testified specific rules regarding entry into Federal facilities by off-duty PSO's was not a subject of that training. (Tr. 587.) He also testified it was common practice for off-duty PSO's to use their credentials to enter these facilities without being screened. (Tr. 587–588.) Moreover, he was able to provide examples of specific instances in which Respondent's supervisors had either engaged in such practice or witnessed it. Todman was straightforward in his responses and no evidence of bias was elicited. Therefore, I find the rule at issue was neither interpreted nor followed by the PSO's in the manner Respondent purports.

L. Discharges for Security Rule Violations

Respondent presented evidence that both before and after this incident, it discharged employees for security breaches and lack of candor. Hagan testified that in February 2013, PSO Dozier was discharged for improper use of his access card. (Tr. 326.) Specifically, Hagan testified Dozier had used his "after hours" access card to enter a closed secure Federal facility to allow a friend to use the restroom. (Tr. 327.) Because it was after hours, there was only one, roving, PSO on site. That PSO reported the incident and Dozier was discharged. (Tr. 327.) There were no further details in the record and no documentation to corroborate this testimony.[9]

The second discharge also involved allowing access to an individual who was required to be screened. In this instance, Darnell Williams, a PSO in Chicago, allowed a contractor's employee into a secure building without screening. (Tr. 327–328; R. Exhs. 6, 7, and 8.) He first disavowed any recollection of the incident, but later admitted to it. According to the inspection form, Williams had been repeatedly informed about specific rules addressing contractor employee identification. (R. Exh. 6.) Respondent issued Williams a suspension notice 6 days after the incident. (R. Exh. 7.) Hagan testified Williams was discharged, but the record does not contain a termination notice, only an email indicating a decision had been made to terminate him. (R. Exh. 8.)

III. DISCUSSION AND ANALYSIS

A. Respondent's Affirmative Defenses

Respondent contends as a threshold matter, that the Board lacks authority to review the termination decisions of Blake, Baker, and Holland because they were based on considerations of national security. Respondent bases this contention on the Supreme Court's ruling in *Department of the Navy v. Egan,* 484 U.S. 518 (1988). In *Egan*, the respondent was a civilian employee of the Navy who was promoted, conditional on a finding of eligibility, to a position classified as "sensitive." Id. at 521. Eligibility for the job included successfully obtaining a security clearance from the Department of the Navy. Following an investigation, the Navy denied Egan his security clearance, rendering him ineligible for the job. He appealed that decision to the Merit Systems Protection Board (MSPB). The Court held the MSPB did not have the authority to review the decision to deny the security clearance because that decision was "committed by law" to the discretionary judgment of the agency responsible for the protection of the classified information. Id. at 527–529. The Court's decision in *Egan* has been extended to preclude judicial review of security clearance determinations as well as the decision to conduct a security clearance review.

Upon careful consideration of the Court's holding in *Egan,* I

[7] I found Kabakova's testimony on this credible. Although Kabakova was often vague, failing to recall dates, he did not appear deliberately evasive. Moreover, his testimony was consistent with other PSO's testimony on this point.

[8] I found Lynn Michael, Kabakova, Blake, Baker, and Holland all credible on this issue as well. All were consistent with regard to the lack of a specific rule or training and that bypassing screening when off duty was common practice. I make note of Todman's testimony because he had been most recently trained, so would be the most familiar with the training, and his demeanor evinced no bias.

[9] Hagan was unable to remember the date of the incident or individual's full name.

find the facts in the instant matter are inapposite and reject Respondent's argument.[10] In the instant case, FPS did not require the PSO's at issue to have a security clearance. As Hagan clarified in her testimony, PSO's have a "suitability," determination, not a security clearance. (Tr. 330.) Indeed, under the Statement of Work, all PSO positions require a suitability determination, while only certain positions require a security clearance. (R. Exh. 4, p. 59.) A required security clearance is provided by the agency requiring the clearance, in other words, the agency responsible for the protection of the classified information. The suitability determination is made by FPS. (Tr. 331; R. Exh. 4.) A suitability determination is valid for 5 years, absent an intervening event that would render the individual unsuitable for work on a contract. Hagan admitted there was no change in FPS's suitability determination for Blake, Baker, or Holland. (Tr. 332.) Unlike the employer in *Egan*, Respondent made the decision to discharge its employees prior to any revocation of FPS's suitability determination. Even if the Court's holding in *Egan* were to apply to FPS' revocation of suitability determinations, it would not apply in the instant case because FPS did not revoke any of the PSOs' suitability determinations, nor does Respondent contend that the investigation by Dingman was initiated in order to review the suitability determination. Thus, Respondent's reliance on *Egan* to shield its decision from Board review is misplaced.

Respondent also contends that the "federal enclave doctrine" precludes the Board from regulating "conduct occurring on" the ACE facility. (R. Br. at 50.) I find Respondent's contention without merit. Respondent relies on the Supreme Court's holding in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), in which the Court found activities on Federal facilities are shielded from direct regulation by a state under the Supremacy Clause. Because this matter does not involve any type of state regulation, I find the "federal enclave doctrine" does not apply.

B. Unfair Labor Practices

1. Legal framework

An employer violates Section 8(a)(3) and (1) of the Act if it discharges an employee for engaging in union activity. The Board applies the framework for deciding allegations of such discriminatory discharge set out in its *Wright Line* decision. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under this framework, the burden is on the General Counsel to make out an initial showing that the employee's protected or union activity was a motivating factor in the adverse employment action. In order to establish this initial showing, the General Counsel must prove: (1) the employee engaged in union or concerted activity protected by the Act; (2) the employer knew of the concerted nature of the activity; and (3) the adverse action taken against the employee was motivated by the activity. Circumstantial evidence, such as suspicious timing, false reasons, failure to adequately investigate misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment, may be used to show discriminatory motive. *Medic One, Inc.,* 331 NLRB 464 (2000).

Once the General Counsel has met its initial showing that the protected activity was a motivating or substantial reason for the employer's decision to take adverse action, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *Consolidated Bus Transit, Inc.,* 350 NLRB 1064, 1065–1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); P*alace Sports & Entertainment, Inc. v. NLRB,* 411 F.3d 212, 223 (D.C. Cir. 2005), rehearing en banc denied (2005).

2. Contentions of the parties

The General Counsel contends Respondent discharged Blake, Baker, and Holland because they engaged in union and concerted protected activities. Blake, Baker, and Holland were each officers in the new union and participants in the negotiations for a new collective-bargaining agreement, and brought workplace concerns and the potential for a strike to the attention of the facility tenant. The General Counsel contends because of this protected activity Respondent initiated and participated in an investigation undertaken by FPS which was motivated by antiunion animus, and ultimately acquiesced in FPS's unlawfully motivated request to discharge Blake, Baker, and Holland.

Respondent contends that the General Counsel cannot meet her initial burden under *Wright Line* to establish that antiunion animus played any part in the decision to discharge Blake, Baker, and Holland. Respondent contends the record contains no direct evidence of animus on the part of its decisionmakers. Further, Respondent contends, even if the General Counsel could prove discriminatory animus, it would have taken the same action in the absence of the discriminatory motive. Respondent contends it was obligated under its contract with FPS to take whatever action FPS requested. Moreover, Respondent contends, none of its decisionmakers could have been aware of any discriminatory motivation on the part of Dingman, if one existed, and that Dingman's report provides legitimate grounds upon which to discharge Blake, Baker, and Holland.[11]

3. Applicability of *Capital CMI Music*

The General Counsel contends that the antiunion animus of Dingman should be imputed to Respondent pursuant to the Board's holding in *Capital EMI Music*, 311 NLRB 997 (1993), enfd. 23 F.3d 399 (4th Cir. 1994). In *Capital EMI Music*, the Board held an employer may be held liable for the discriminatory employment actions of its joint employer where the record permits an inference that the nonacting employer "knew or

[10] The General Counsel did not brief this issue.

[11] Respondent also contends in its brief that application of the analytical framework set out by the Supreme Court in *NLRB v. Burnup & Sims*, *Inc*., 379 U.S. 21 (1964), would not lead to a different result. The General Counsel has not asserted liability under this analytical framework and, in fact, argued against application of *Akal Security, Inc*., 355 NLRB 584 (2010) (reaffirming and incorporating by reference 354 NLRB 1 (2009)) (applying the *Burnup & Sims* analysis to the discharge of security officers at a Federal courthouse). Because the General Counsel does not contend this analytical framework is applicable, I have not addressed it herein. Further, I find this matter is properly analyzed under *Wright Line* because it turns on motive.

should have known" the other employer acted with an unlawful motive and acquiesced in the unlawful action by either failing to protest or "exercise any contractual right it might possess to resist it." *Capital EMI Music*, supra at 1000. A necessary prerequisite for applicability of this theory of liability is a showing that the two employers are joint employers. The General Counsel has to the burden to make that showing. Here, the General Counsel did not plead joint employer status nor did either party address the issue in its briefs. Thus, I find joint employer liability was not a matter fully litigated by the parties and decline to apply the Board's holding in *Capital EMI Music* to the instant case.

4. Prima facie case

I find that the General Counsel has made a prima facie showing under the *Wright Line* analysis. Neither protected activity nor knowledge were significantly in dispute as Blake, Baker, and Holland all held officer positions with the Union and were involved in internal management of the Union, filing of grievances, communicating with Respondent's management about working conditions, and, in the case of Blake and Holland, negotiating an initial collective-bargaining agreement. (Tr. 31; 134; 192.) Moreover, I find that bringing a potential strike to the attention of the Colonel was activity protected under the Act. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978). Respondent concedes it was aware each of these individuals was an office holder with the Union, members of the negotiating team, and, in the case of Blake and Baker, had been involved in raising the issue of a strike with the Colonel.

The final element the General Counsel must establish as part of its initial burden is that Blake, Baker, and Holland were discharged because of their protected activity. I find the General Counsel has met that burden. Specifically, I find the circumstances, when viewed as a whole, establish Respondent's discharge of Blake, Baker, and Holland was discriminatorily motivated. The preponderance of the evidence supports a finding Respondent was aware Dingman's animus toward the protected activity formed the basis for her recommendation yet deliberately conducted an inadequate investigation into the allegations against Blake, Baker, and Holland in order to justify its decision to discharge them.

The investigation that led to the discharge of Blake, Baker, and Holland began with a phone call from Fields to Dingman on February 17 in which Fields told Dingman a PSO had contacted the Army Corps of Engineers about a potential strike by the PSO's. Neither Field's explanation for making the call to Dingman, nor Dingman's explanation for conducting her investigation is credible. The Union issued its strike notice to the bargaining committee members on January 22. (GC Exh. 3.) Thus, by the time he contacted Dingman on February 17, Fields had been aware for several weeks that the Union had issued a strike notice. Moreover, at some time during contract negotiations, Dingman requested and Respondent provided a contingency plan in case of a strike. (Tr. 510.) Thus, there was no need for Dingman to investigate whether a strike was imminent for contingency planning purposes.

I find it telling that Fields acted only after Blake contacted the Army Corps of Engineers and, contrary to her repeated assertions, Dingman's focus was on whom, and in what manner, the strike notice was delivered, not on the likelihood of a strike. According to her own report, Dingman never asked anyone about the likelihood of a strike and when testifying, was unable to explain why. (Tr. 450–460.) Moreover, Dingman's antipathy toward the Union and its intent to strike, as well as toward Blake directly contacting the client is uncontroverted on the record. I found Fields lacked credibility based on both his inconsistent testimony and demeanor when testifying.[12] His testimony that he lacked any knowledge of why Dingman intended to conduct interviews strained credulity. (Tr. 516.) It seems unlikely Fields would have no understanding of why Dingman would be interviewing employees whom he supervised after having contacted her only days before. In this context, I find the evidence establishes Dingman's purpose and focus was Blake's discussing PSO grievances and the strike notice with the Colonel.

Moreover, the record contains direct evidence of Dingman's antiunion animus and Respondent's knowledge of that animus. Dingman told each of the PSO's a strike would result in their termination and inability to ever work another Government contract. She further admonished them about going directly to the building tenant with workplace concerns. I find these statements establish Dingman's negative attitude toward the PSO's protected activity.[13] Moreover, each of these statements was made in the presence of Edmiston. Thus, I find Respondent was aware of Dingman's antiunion motivation.

I also find sufficient circumstantial evidence to establish Respondent itself acted with discriminatory motive. Upon reviewing the report submitted by Dingman, Respondent made the decision to discharge Blake, Baker, and Holland without conducting any investigation. The Board has held evidence that an employer fails to adequately investigate alleged misconduct or allow an employee the opportunity to explain his or her actions supports an inference of animus and discriminatory motivation. *Midnight Rose Hotel & Casino, Inc*., 343 NLRB 1003, 1005 (2004), affd. 198 Fed. Appx. 752 (10th Cir. 2006); *W. W. Grainger, Inc. v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978); *Relco Locomotives, Inc.,* 358 NLRB No. 37, slip op. at 14 (2012), enfd. 734 F.3d 764 (8th Cir. 2013); *American Crane Corp.,* 326 NLRB 1401, 1410 (1998), enfd. 203 F.3d 1819 (4th Cir. 2000). Dingman's report, which specifically reference an understanding by the PSO's that they had not engaged in any direct rule violation, would have lead a reasonable employer to question and investigate whether Blake and Baker had engaged in the misconduct alleged. Moreover, such an investigation would have revealed that bypassing screening by off-duty

[12] Fields was evasive when testifying, often stating he did not understand or needed to have repeated, simple, straightforward questions. He had lengthy pauses between questions and answers and contradicted prior sworn testimony. (Tr. 499; 501.)

[13] I have not found that any of these statements constitute an 8(a)(1) violation, nor is such a finding necessary. The Board has long held such statements, although not rising to the level of an 8(a)(1) violation, may still be evidence of animus. *NACCO Materials Handling Group, Inc*., 331 NLRB 1245 (2000); *General Battery Corp*., 241 NLRB 1166, 1169 (1979).

PSO's was a widespread practice, not a clear and well-enforced rule violation.

Several current and former PSO's testified it was common practice for PSO's to use their credentials to enter these facilities without being screened. (Tr. 587–588.) Moreover, this was done in the presence of Respondent's managers. I find both Field's and Edmiston's denials of having seen such conduct lack credibility.[14] I also find, based on this evidence, Respondent did not treat similar conduct in the same manner. I am not persuaded by Respondent's argument that because only sergeants witnessed this conduct and failed to act supports a finding that management was unaware of these infractions. The record establishes sergeants had the authority to impose discipline for rule infractions. I find that this practice was witnessed by those with the authority to impose discipline who tolerated the conduct.

Nor could any of Respondent's witnesses explain why, in light of the purported severity of the misconduct, were no actions taken for over 3 months. Edmiston was present for all of the interviews and was aware of the alleged misconduct in February. However, she did nothing. Edmiston had the authority to take disciplinary action. She testified she did nothing because she did not want to interfere and wanted to remain neutral. (Tr. 557–558.) I do not find this a reasonable explanation for her failure to act, if the purported misconduct was as serious as Respondent alleged. *Temp-Rite Air Conditioning Corp.,* 322 NLRB 767 (1996) (a delay in taking action after the misconduct may rebut an employer's contention that it would have taken the disciplinary action in the absence of protected activity).

Respondent had a progressive disciplinary policy under which it could have taken disciplinary action against Blake, Baker, and Holland. Just as it chose not to investigate the alleged misconduct, Respondent chose not to follow this policy, either at the time Edmiston became aware of the alleged misconduct or at the time it received Dingman's report. This failure to follow its own progressive disciplinary policy also raises an inference of discriminatory motive. The three PSO's had no prior disciplinary history and had not committed any of the offenses enumerated in Respondent's progressive disciplinary policy that might result in discharge for a first offense. Thus, I find that applying Respondent's own policy would likely not have led to a decision to discharge, but for a discriminatory motive.

Finally, I find Respondent's contention it was required to discharge Blake, Baker, and Holland under the terms of its contract with FPS to be false and Respondent's statements in its termination notices to that effect to be misrepresentations. The Statement of Work does provide the COTR and CO authority to request the removal of a PSO from work on a contract. FPS has a directive specifying the procedure under which PSO's are to be removed, if done so at the direction of FPS. That procedure was not followed here because, as Dingman testified, FPS did not request the removal of the PSO's. (Tr. 446.) Hagan admitted Respondent could have appealed Dingman's recommendation to the CO. Hagan's testimony that Respondent was without any option but to discharge Blake, Baker, and Holland is not credible. Rather, I find Respondent made a decision absent such directive or request.

Based on the foregoing analysis, I find the General Counsel has met his burden to establish Respondent discharged Blake, Baker, and Holland because each actively engaged in protected and union activity.

5. Respondent's burden

Respondent contends, even if discriminatory animus played a part in the discharge decisions, it would have taken the action that it did absent the discriminatory motive. As previously discussed, Respondent contends it was obligated to follow the recommendation of the COTR. In addition, Respondent contends Dingman's report provided an adequate basis upon which to base its discharge decision. In support of that contention, Respondent presented evidence it discharged PSO's for similar security breaches and lack of candor. I do not find these instances to be sufficiently similar to meet Respondent's burden.

Hagan testified that in February 2013, PSO Dozier was discharged for improper use of his access card. (Tr. 326.) The record contains no details and no documentation to corroborate Hagan's testimony. In order to establish similarly situated employees were treated the same, Respondent would need to present more than uncorroborated, vague recollections. Moreover, this discharge took place after the discharges in the instant matter. Such post-hoc actions are insufficient to meet Respondent's burden.

The second purportedly similar discharge involving PSO Williams in Chicago is also not sufficient to meet Respondent's burden. A significant distinction between this and the instant case is that, according to the inspection form, Williams had been informed on repeated occasions about specific rules addressing contractor employee identification. (R. Exh. 6.) Respondent did not include the referenced attachment containing this directive to the inspection report. Such failure to produce documents within its control leads to the conclusion that this evidence would be unfavorable to Respondent. See *International Automated Machines*, *Inc*., 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). I have previously found the rule at issue in this case was not clearly communicated or consistently enforced. Thus, I find Respondent's example too distinct from the instant case to meet its burden to show it treated similar conduct the same.

I further find insufficient evidence to conclude the purported security breach at issue in the instant case to be the clear rule violation warranting discharge Respondent purports it to be. Neither the SGIM nor the post orders for the ACE facility contain a rule specifically prohibiting an off-duty PSO from entering a building in which he works using his credentials to bypass screening. The conduct rule in the SGIM addressing use of credentials is a broad admonition against "unethical or improp-

[14] I have previously found Fields lacked credibility. I similarly find Edmiston was not a credible witness. Edmiston, like Fields, was evasive and her testimony was marked by pregnant pauses. Indeed, she failed to answer several questions, simply staring blankly at the questioner. (Tr. 542, 547, 544; 560; 562.) Edmiston appeared confused and unable to answer simple questions and went as far as to deny knowing that she had signed the suspension notices for Blake, Baker, and Holland. (Tr. 559.)

er use of official authority, credentials or equipment." (Jt. Exh. 2, p. 13.) I do not find it the clear admonition against the specific conduct at issue. Moreover, it is not further clarified by reference to section 5.5 as Respondent contends. I find Respondent's reading of section 5.5 to apply to this situation to be tortured. Moreover, Respondent's evidence of how PSO's are trained was confusing. I did not find Respondent's witnesses with knowledge of how PSO's are trained to be credible on this issue. Thus, I find Respondent has failed to meet its burden to establish it would have made the discharge decision based on the alleged rule violation, absent a discriminatory motive.

Finally, Respondent presented no evidence it has taken any disciplinary action against a PSO for lack of candor alone.

I have previously found Respondent was neither obligated nor without option but to follow FPS's request. Based on the analysis above, I further find Respondent has not met its burden to establish it has treated similar misconduct in the same manner. Thus, I find Respondent failed to establish it would have taken the actions that it did absent a discriminatory motive.

Accordingly, I find Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Blake, Baker, and Holland for engaging in concerted protected and union activity.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Arthur Blake.
4. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Joel Baker.
5. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged John Holland.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the polices of the Act.

The Respondent having discriminatorily discharged Arthur Blake, Joel Baker, and John Holland must offer each reinstatement and make each whole for any losses, earnings, or other benefits incurred as a result of Respondent's discharge of them. These amounts are to be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In accordance with *Latino Express, Inc.,* 359 NLRB No. 44 (2012), Respondent shall compensate Arthur Blake, Joel Baker, and John Holland for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each.

On these findings and conclusions of law and on the entire record, I issue with following recommended[15]

ORDER

Respondent, Paragon Systems, Inc., Savannah, Georgia, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they engage in union activity or other activity protected by Section 7 of the Act.

(b) In any like or related manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Arthur Blake reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; and remove from its files any and all references to the unlawful suspension and termination and within 3 days thereafter notify Arthur Blake in writing that this has been done and that the discipline will not be used against him in any way.

(b) Make Arthur Blake whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the board's Order, offer Joel Baker reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; and remove from its files any and all references to the unlawful suspension and termination and within 3 days thereafter notify Joel Baker in writing that this has been done and that the discipline will not be used against him in any way.

(d) Make Joel Baker whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of the Board's Order, offer John Holland reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; and remove from its files any and all references to the unlawful suspension and termination and within 3 days thereafter notify John Holland in writing that this has been done and that the discipline will not be used against him in any way.

(f) Make John Holland whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of the decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Savannah, Georgia, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, DC February 7, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Security Police Officers of America or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Arthur Blake full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Arthur Blake whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, offer Joel Baker full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joel Baker whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, offer John Holland full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Holland whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate Arthur Blake, Joel Baker, and John Holland for the adverse tax consequences, if any of receiving on or more lump-sum backpay awards covering periods longer than 1 year.

PARAGON SYSTEMS, INC.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."